

No 269.

An objection was suggested to this claim by the factor, upon the 6th and 10th clauses of the statute, bearing, in substance, That such creditors as shall not produce their claims, with the vouchers thereof, and make oath on the verity of their debts, 'within nine kalendar months after the date of the sequestration,' shall not be entitled to any share in the first distribution of the debtor's estate among the creditors.

The nine kalendar months were expired before the claim or vouchers were lodged.

Answered for the creditors: That another rule is adopted in § 11th of the statute, by which it is enacted, 'That such creditors only, who shall have produced their vouchers, and grounds of debt, and proved the verity thereof, before the day fixed for each distribution, as before mentioned, shall be entitled to a share in such distribution.' By this, it seems to be meant, that it is sufficient if the debts are proved, and vouchers produced, before the day fixed for the distribution.

The Court found, 'In respect that the claims of Montgomery, Wilson, and Smith, with the vouchers thereof, were not lodged with the clerk to the sequestration before the expiry of nine kalendar months from the date of the sequestration, that, therefore, they were not entitled to draw any share of the bankrupt's effects in the first distribution.'

For the Factor, *Ad. Ogilvie.*

Alt. Rolland.

Fac. Col. No 5. p. 10.

No 270.

A factor under 12th Geo. III. paid the bankrupt's landlord the rent due to him, without being claimed and proved as the statute directs. Objection to this payment sustained.

1779. February 6.

JAMES DICKSON *against* ADAM WATSON.

GEORGE LANDELS possessed part of a farm as subtenant under his father James Landels. Having fallen into arrear of half a year's rent, the Sheriff, upon the application of the father, sequestrated his crop and stocking for security of this arrear, and of the half year's rent to become due at the next term.

Before that time George Landels became bankrupt. His personal effects were sequestrated upon the act 12th Geo. III. and a factor was named. The factor sold his crop and stocking, and paid up to James Landels the year's rent due by his son. The factor, in the state of the bankrupt's funds lodged by him, took credit for this article; to which it was

Objected by a creditor of the bankrupt: That this arrear of rent is paid by the factor, without having been claimed and proved by the creditor as the statute directs, and therefore cannot be allowed.

Answered for the factor: The creditor, in this case, had a security over the crop and stocking of the bankrupt by his hypothec, and would have been entitled to draw his payment out of these subjects, without coming into this Court to

claim and instruct his debt. He had obtained a sequestration of these subjects from the Sheriff, for making his debt upon them effectual, before the sequestration under the statute had taken place. In these circumstances, the creditor was not obliged to part with the effects to the factor, and make the circuit of claiming and proving his debt before he could recover it. He might have proceeded to sell the subjects under the authority of the Sheriff, by whom they were sequestrated; and thereby got immediate payment of his rent.

There is nothing in the statute to have prevented him from following this course. The statute does not take away the right of hypothec itself, nor the summary methods founded on it, which have been constantly practised by landlords for recovery of their rents.

As, therefore, the creditor could have recovered his debt out of the effects, by means of the sequestration, without claiming in this Court, it was for the interest of the other creditors to pay up the debt, and relieve the effects of this burden.

Replied for the objector: The sequestration awarded by the Sheriff could have no other effect prior to an actual sale, than to secure the subjects falling under the hypothec from being embezzled. It did not transfer the property of the effects to the bankrupt's father, and could not prevent them from falling under the general sequestration of this Court.—So it was found in the case of *Brown contra Gordon and Frazer, 1773, (not reported.)*

These effects, therefore, could not have been disposed of by the father at his own hand, or by warrant of the Sheriff. The debt, no doubt, continued preferable in consequence of the hypothec; but there was no method of obtaining payment, except by claiming and proving it, as directed by the statute.

The Court 'sustained the objection to the rents stated as paid to the father, these debts not having been claimed or proved by the father in terms of the statute.' *See HYPOTHEC.*

Lord Ordinary, *Alva.*

Aët. McLeod.

Alt. Sinclair.

Clerk, Tait.

Fac. Col. No 67. p. 127.

1784. February 19.

RICHARDSON against SHIELLS.

No 271.

12th Geo.
III. c. 72.

A PERSON had obtained a sequestration under 12th Geo. III. c. 72. of the effects belonging to himself and his deceased father.

In a competition with an executor creditor, it was the opinion of the Court, that sequestration, in pursuance of the bankrupt statutes, was an inept diligence for attaching the effects of a defunct.

See The particulars of the case, *voce* SERVICE and CONFIRMATION.

Fac. Col. No 147. p. 229.